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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Adoption of Recommendations

AGENCY: Administrative Conference of the United States.

ACTION: Notice.

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SUMMARY: The Administrative Conference of the United States adopted four recommendations at its Fifty-fifth Plenary Session. The appended recommendations address incorporation by reference, international regulatory cooperation, the Federal Advisory Committee Act, and agency innovations in e-rulemaking.

FOR FURTHER INFORMATION CONTACT: For Recommendations 2011-5 and 2011-8, Emily Schleicher Bremer, Attorney Advisor, and for Recommendations 2011-6 and 2011-7, Reeve T. Bull, Attorney Advisor. For all four recommendations the address and phone number is: Administrative Conference of the United States, Suite 706 South, 1120 20th Street, NW, Washington, DC 20036; Telephone 202-480-2080.

SUPPLEMENTARY INFORMATION: The Administrative Conference Act, 5 U.S.C. 591-596, established the Administrative Conference of the United States. The Conference studies the efficiency, adequacy, and fairness of the administrative procedures used by Federal agencies and makes recommendations for improvements to agencies, the President, Congress, and the Judicial Conference of the United States (5 U.S.C. 594(1)). For further information about the Conference and its activities, see <http://www.acus.gov>.

At its Fifty-fifth Plenary Session, held December 8-9, 2011, the Assembly of the Conference adopted four recommendations. Recommendation 2011-5, "Incorporation by Reference," addresses legal and policy issues related to agencies' incorporation by reference in the Code of Federal

Regulations of standards or other materials that have been published elsewhere. Agencies have promulgated thousands of regulations that incorporate by reference standards published elsewhere. The practice raises common issues that individual agencies deal with differently. The recommendation consolidates the dispersed knowledge of affected agencies, identifies best practices, and recommends ways to improve the process.

Recommendation 2011-6, "International Regulatory Cooperation," addresses how U.S. regulators can interact with foreign authorities to accomplish their domestic regulatory missions and eliminate unnecessary non-tariff barriers to trade. The project updates Administrative Conference Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators." The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges.

Recommendation 2011-7, "The Federal Advisory Committee Act - Issues and Proposed Reforms," addresses the issue of whether the Federal Advisory Committee Act ("FACA") is functioning effectively and efficiently almost 40 years after its enactment. The recommendation offers three sets of proposed revisions to the existing FACA regime to make the law more relevant in light of agency experience with FACA and 21st century technologies. Specifically, the recommendation includes proposals designed to clarify the scope of FACA and its implementing regulations, alleviate certain procedural burdens associated with the existing regime, and promote "best practices" aimed at enhancing the transparency and objectivity of the advisory committee process.

Recommendation 2011-8, "Agency Innovations in E-Rulemaking," addresses how Federal agency rulemaking can be improved by better use of Internet-based technologies. The recommendation proposes ways

agencies can make rulemaking information, including open dockets, comment policies, and materials from completed rulemakings, more accessible electronically. The recommendation also addresses the issue of improving e-rulemaking participation by those who have historically faced barriers to access, including non-English speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

The Appendix (below) sets forth the full text of these four recommendations. The Conference will transmit them to affected agencies and to appropriate committees of the United States Congress. The recommendations are not binding, so the relevant agencies, the Congress, and the courts will make decisions on their implementation.

The Conference based these recommendations on research reports that it has posted at: <http://www.acus.gov/events/55th-plenary-session/>. A video of the Plenary Session is available at the same web address, and a transcript of the Plenary Session will be posted once it is available.

Dated: January 10, 2012.

Paul R. Verkuil,  
*Chairman.*

**APPENDIX--RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE  
UNITED STATES**

**Administrative Conference Recommendation 2011-5**

**Incorporation by Reference**

**Adopted December 8, 2011**

Incorporation by reference allows agencies to comply with the requirement of publishing rules in the Federal Register to be codified in the Code of Federal Regulations (CFR) by referring to material published elsewhere.<sup>1</sup> The practice is first and foremost intended to—and in fact does—substantially reduce the size of the CFR. But it also furthers important, substantive regulatory policies, enabling agencies to draw on the expertise and resources of private sector standard developers to serve the public interest. Incorporation by reference allows agencies to give effect to a strong federal policy, embodied in the National Technology Transfer and Advancement Act of 1995 and OMB Circular A-119, in favor of agency use of voluntary consensus standards.<sup>2</sup> This federal policy benefits the public, private industry, and standard developers.

The Conference has conducted a study of agency experience with the practice of incorporation by reference, including the use of voluntary consensus standards. The study focused on three issues agencies frequently confront when incorporating by reference: (1) ensuring materials incorporated by reference are reasonably available to regulated and other interested parties; (2) updating regulations that

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<sup>1</sup> See 5 U.S.C. § 552(a)(1); 1 C.F.R. §§ 51.1-51.11.

<sup>2</sup> See National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 (1996); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998); *see also* Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979) (recommending agencies use voluntary consensus standards in health and safety regulation). Circular A-119 defines voluntary consensus standards as those created by private or international organizations whose processes provide attributes of openness, balance, due process, an appeal, and decision making by general agreement (but not necessarily unanimity). *See also* American National Standards Institute, "ANSI Essential Requirements: Due process requirements for American National Standards" (2010).

incorporate by reference; and (3) navigating procedural requirements and resolving drafting difficulties when incorporating by reference. Agencies have used a variety of approaches to address these issues within the constraints of federal law and regulatory policy. This recommendation identifies and encourages those approaches that have proven most successful.

*Availability of Incorporated Materials.* Ensuring that regulated and other interested parties have reasonable access to incorporated materials is perhaps the greatest challenge agencies face when incorporating by reference. When the relevant material is copyrighted—as is often the case with voluntary consensus standards—access issues are particularly problematic. There is some ambiguity in current law regarding the continuing scope of copyright protection for materials incorporated into regulations,<sup>3</sup> as well as the question of what uses of such materials might constitute “fair use” under section 107 of the Copyright Act.<sup>4</sup> Efforts to increase transparency of incorporated materials may conflict with copyright law and with federal policies

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<sup>3</sup> See, e.g., *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc). This case held that where local law had incorporated a privately developed building code, a private party’s posting of the resulting local law did not violate copyright, because the law was in the public domain. *Id.* at 793, 802. However, the court distinguished cases concerning the incorporation by reference of materials “created by private groups for reasons other than incorporation into law,” *id.* at 805, leaving some uncertainty as to the rule applicable to many voluntary consensus standards.

<sup>4</sup> See, e.g., OFFICE OF LEGAL COUNSEL, DEP’T OF JUSTICE, *Whether and under what Circumstances Government Reproduction of Copyrighted Materials Is a Noninfringing “Fair Use” under Section 107 of the Copyright Act of 1976* (1999). This opinion noted that there is no per se rule under which government reproduction of copyrighted materials for governmental use invariably qualifies as fair use, but also noted that such reproduction would in many contexts constitute a noninfringing fair use. The opinion focused on government reproduction for internal government use and did not consider government republication of copyrighted materials.

recognizing the significant value of the public-private partnership in standards.

This recommendation does not attempt to resolve the questions of copyright law applicable to materials incorporated by reference into federal regulations. Rather, the recommendation encourages agencies to take steps to promote the availability of incorporated materials within the framework of existing law. This effort is consistent with the National Science and Technology Council's acknowledgment that "the text of standards and associated documents should be available to all interested parties on a reasonable basis, which may include monetary compensation where appropriate."<sup>5</sup> The Conference's research reveals that some agencies have successfully worked with copyright owners to further the goals of both transparency and public-private collaboration. Some agencies have, for example, secured permission to make a read-only copy of incorporated material available in the agency's public, electronic docket during the pendency of the rulemaking proceeding relating to the material. In other cases, the copyright owner has made the material publicly available in read-only form on its own website. This recommendation encourages agencies to take these or other steps to promote availability of incorporated materials, such as encouraging copyright owners to make incorporated materials available in libraries.

*Updating Regulations.* Updating regulations that incorporate by reference is another challenge. Agencies are legally required to identify the specific version of material incorporated by reference and

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<sup>5</sup> See SUBCOMMITTEE ON STANDARDS, NAT'L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* 11 (Oct. 10, 2011).

are prohibited from incorporating material dynamically.<sup>6</sup> When an updated version of the incorporated material becomes available, the regulation must be updated if the agency wants the regulation to incorporate the new version. This can require the agency to engage in notice-and-comment rulemaking, which entails a significant investment of agency resources. For agencies that are statutorily required to provide rulemaking procedures beyond those required by Section 553 of the Administrative Procedure Act (APA), updating may prove to be an immense challenge. Nonetheless, agencies have successfully used a variety of techniques to reduce the time and cost constraints of updating rules. Some agencies have used enforcement discretion or "equivalency determinations" to avoid penalizing parties that comply with an updated version of an incorporated standard that the agency finds to be equivalent to or superior to the version still incorporated in the agency's regulations. Other agencies have reduced the burden of updating by tracking forthcoming revisions through participation in standard-development activities.<sup>7</sup> Still others have used direct final rulemaking to reduce the costs of updating an incorporating regulation. The recommendation encourages these time- and cost-saving techniques. This recommendation also proposes a statutory solution that would streamline the administrative process by which agencies can revise their regulations to account for updates to the incorporated material.

*Complying with Procedural Requirements.* Finally, successfully incorporating by reference requires agencies to comply with detailed

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<sup>6</sup> See 1 C.F.R. § 51.1(f); see also OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES ¶ 6(j) (1998).

<sup>7</sup> See SUBCOMMITTEE ON STANDARDS, NAT'L SCI. & TECH. COUNCIL, EXEC. OFFICE OF THE PRESIDENT, *Federal Engagement in Standards Activities to Address National Priorities: Background and Proposed Recommendations* (Oct. 10, 2011).

procedures and to draft regulations carefully. The Office of the Federal Register (OFR) is statutorily charged with approving all incorporations by reference, and has issued regulations and guidance establishing policies and procedures for doing so. Procedural errors can delay the publication of rules that incorporate by reference. Poor drafting may create confusion among regulated parties or produce a rule that does not fulfill the agency's regulatory purpose. The Conference's research revealed that agencies reporting few or no problems in complying with OFR's incorporation by reference procedures followed identifiable best practices that other agencies should consider adopting.

#### **RECOMMENDATION**

##### **Ensuring Incorporated Materials are Reasonably Available**

1. Agencies considering incorporating material by reference should ensure that the material will be reasonably available both to regulated and other interested parties.
2. If an agency incorporates by reference material that is not copyrighted or subject to other legal protection, the agency should make that material available electronically in a location where regulated and other interested parties will be able to find it easily.
3. When an agency is considering incorporating copyrighted material by reference, the agency should work with the copyright owner to ensure the material will be reasonably available to regulated and other interested parties both during rulemaking and following promulgation.
  - (a) Agencies should request owners of copyright in incorporated material to consent to its free publication, and, if such consent is given, make the material available as in paragraph (2), above.
  - (b) If copyright owners do not consent to free publication of incorporated materials, agencies should work with them and, through the



use of technological solutions, low-cost publication, or other appropriate means, promote the availability of the materials while respecting the copyright owner's interest in protecting its intellectual property.

(c) If more than one standard is available to meet the agency's need, it should consider the availability of the standards as one factor in determining which standard to use.

4. In deciding whether to incorporate a particular copyrighted material by reference, and in working with a copyright owner to ensure the material is reasonably available, an agency should consider:

(a) The stage of the regulatory proceedings, because access may be necessary during rulemaking to make public participation in the rulemaking process effective;

(b) The need for access to achieve agency policy or to subject the effectiveness of agency programs to public scrutiny;

(c) The cost to regulated and other interested parties to obtain a copy of the material, including the cumulative cost to obtain incorporated material that itself incorporates further materials; and

(d) The types of parties that need access to the incorporated material, and their ability to bear the costs of accessing such materials.

5. When considering incorporating by reference highly technical material, agencies should include in the notice of proposed rulemaking an explanation of the material and how its incorporation by reference will further the agency's regulatory purpose.

#### **Updating Incorporations by Reference**

6. Agencies should periodically review regulations and make technical amendments (i.e., nonsubstantive amendments that do not require notice and comment) as necessary to ensure that complete and accurate access

information<sup>8</sup> is included in all regulations that incorporate by reference. Agencies should ensure that they are notified of all changes to access information.

7. Agencies that regularly incorporate private standards should adopt internal procedures to ensure good communication of emerging revisions to those within the agency charged with making policy decisions and writing rules. Agencies should consider participating in standard-setting activities in order to maintain awareness of emerging revisions.<sup>9</sup>

8. Agencies should not address difficulties with updating by confining incorporations by reference to non-binding guidance documents. If an agency intends to make compliance with extrinsic material mandatory, it should incorporate that material by reference in a legislative rule.

9. In the interests of fairness and transparency, agencies should publish regulations or guidance establishing the policies and principles governing equivalency determinations or guiding this use of enforcement discretion in situations where they have been unable to update incorporations by reference in regulations.

10. For rulemakings subject to Section 553 of the APA, agencies should use direct final rulemaking for noncontroversial updates to incorporations by reference.<sup>10</sup>

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<sup>8</sup> "Access information" informs the public of where it can inspect or obtain a copy of the incorporated material. See 1 C.F.R. § 51.9(b)(4); Nat'l Archives & Records Admin., Federal Register Document Drafting Handbook § 6.4 (Jan. 2011).

<sup>9</sup> See Administrative Conference of the United States, Recommendation 78-4, *Federal Agency Interaction with Private Standard-Setting Organizations in Health and Safety Regulation*, 44 Fed. Reg. 1,357 (Jan. 5, 1979).

<sup>10</sup> See Administrative Conference of the United States, Recommendation 95-4, *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,108, 43,112 (June 15, 1995).

11. Congress should consider authorizing agencies to use streamlined procedures to update incorporations by reference. An appropriate statutory solution would:

(a) Provide for interested parties to file a petition for rulemaking that would notify the agency of a revised standard, identify the changes from the incorporated version of the standard, explain why updating would be consistent with the agency's regulatory purpose, and provide information on the costs and benefits of incorporating the revised standard;

(b) Vest the agency with authority to determine whether to act on the petition; and

(c) Authorize agencies to grant the petition by issuing a final rule, without regard to otherwise applicable rulemaking requirements, provided that the agency first:

(1) Publishes a notice of the petition in the Federal Register, indicates in that notice what regulations the requested update would affect, and provides for public comment on the petition; and

(2) Finds that updating regulations as requested in the petition is beneficial and consistent with the regulatory purpose of the relevant regulation.

#### **Navigating Procedural Requirements**

12. Each agency that incorporates by reference should task its Office of the Federal Register (OFR) liaison or another employee with being a point of contact with OFR and maintaining a close working relationship between the two agencies. Such agencies should take advantage of OFR's training opportunities and follow the procedures of its Document Drafting Handbook (DDH).

13. When considering a regulation that would incorporate by reference, agencies should ensure legal counsel or other experts in OFR

regulations, DDH, and policy are involved early in the rulemaking process to reduce the potential for delays in publishing rules.

Agencies considering incorporating by reference should reach out to OFR staff early in the rulemaking process.

14. OFR should continue and expand upon its efforts to make the process easier through an electronic submission and review process for incorporation by reference requests.

#### **Improving Drafting Techniques**

15. Agencies should ensure that incorporations by reference support, rather than detract from, the usefulness and readability of the Code of Federal Regulations. Incorporated material may provide detail, but a regulation should, by itself, make the basic concept of the rule understandable without the need for the reader to refer to the incorporated material.

16. Agencies should review the language used in material they are considering incorporating by reference to determine whether it is mandatory or merely advisory or voluntary. Agencies promulgating mandatory regulations should take care to specify in the regulation which portions of the material will be considered mandatory after incorporation.

17. When an agency incorporates a document that references a second (or greater) tier document, the agency should acknowledge and explain the substantive legal effect of the secondarily referenced document(s).

OFR should consider amending the DDH to call attention to the potential issue of secondary references. If an agency wants to make a second tier document mandatory, it should ensure that such material is reasonably available both to the regulated community and other interested parties.

18. Agencies should be alert to the possibility that some part of their regulations may inadvertently conflict with a requirement incorporated by reference. When drafting regulations, agencies should avoid or resolve any such conflicts.

**Administrative Conference Recommendation 2011-6**

**International Regulatory Cooperation**

**Adopted December 8, 2011**

In June 1991, the Administrative Conference issued Recommendation 91-1, "Federal Agency Cooperation with Foreign Government Regulators," finding that "[i]f American administrative agencies could ever afford to engage in regulatory activities without regard to the policies and practices of administrative agencies abroad, the character and pace of world developments suggest that that era has come to a close," and recommending practices such as information exchanges and establishment of common regulatory agendas to facilitate regulatory cooperation. While many of the issues identified in that recommendation remain relevant today, the pace of globalization in the past two decades has created new challenges and dynamics since then. Not only have institutions promoting international cooperation become more robust, with relevant developments including the founding of the World Trade Organization and increasing integration amongst the member states of the European Union, but the volume of trade in goods, services, and information across borders has increased dramatically.

Given these developments, the Administrative Conference commissioned a research project to review international regulatory cooperation at United States government agencies today, assess how the 1991 recommendation has been implemented (or not), identify new challenges

that have emerged in the past 20 years, and advise how the 1991 recommendation might be updated to guide agencies in improving international coordination today to benefit regulatory goals and competitiveness. This research shows that, since the 1991 recommendation was adopted, the international coordination efforts of agencies have greatly expanded. Yet the need for international coordination has also greatly expanded due to increased trade in goods, services, and information. Incompatible regulatory requirements in different countries persist. Sometimes these regulations are different for non-substantive reasons - regulators share common goals and methods of regulation, but for historical or other reasons, regulations remain inconsistent. Sometimes regulations differ because regulators in different countries do not agree on important substantive issues, such as how to weigh scientific evidence or balance competing priorities. When differences are substantive, they can sometimes be ascribed to countries' asserting national goals such as protecting health, safety, or the environment at the levels that they consider appropriate. Other substantive differences, however, may disrupt trade or otherwise operate as de facto protectionist measures. Moreover, even when standards are aligned, different national requirements for conformity assessment, such as testing, certification, inspection, or accreditation, frequently impose their own costs and delays.

The Administrative Conference finds that improved international regulatory cooperation is desirable because it can help United States agencies accomplish their statutory regulatory missions domestically. Indeed, in some areas like regulating the safety of food and drugs, a large proportion of which are imported to the United States, an agency's awareness of and participation in foreign regulatory processes can help to ensure the safety of products reaching United States

markets. International regulatory cooperation can also remove non-tariff barriers to trade and exports, promoting global commerce and United States competitiveness. Moreover, these benefits of international regulatory cooperation are not incompatible and can be pursued in unison.

Because of the global nature of the economy, the domestic regulatory mission of many agencies is affected by what happens overseas. For example, imports of food and pharmaceutical products to the United States have greatly increased over the past 20 years, so that the Food and Drug Administration's (FDA) mission of ensuring food, drug, and device safety in the United States is necessarily intertwined with how these products are regulated in their countries of origin. The Consumer Product Safety Commission faces a similar challenge. Pollutants do not respect political boundaries, so the Environmental Protection Agency's success in achieving its mission in the United States can be affected by environmental regulations in other countries. Financial institutions in the United States participate in the global banking system and are exposed to risks in economies all over the world, which requires financial regulators to coordinate globally. And trade in data crosses national boundaries, requiring the Federal Trade Commission to cooperate with other global regulators in policing Internet fraud.

In addition to the impact on regulatory goals such as health, safety, environmental and consumer protection in the United States, inconsistent regulatory regimes can act as barriers to trade. For example, different food labeling requirements between the United States and Europe require producers who distribute food in both markets to produce the same goods in different packaging, depending on the market, which hinders economies of scale and adds cost and delay. Another

example is that the United States and Europe have different approaches to regulating the length of tractor-trailers. Though the American design has better fuel economy, American manufacturers cannot export trucks that comply with United States requirements into European markets without significant redesign, thereby creating an unnecessary barrier to trade.

Many agencies successfully engage in international cooperation through a variety of different methods, such as coordination in regulatory promulgation, mutual recognition of inspection and certification regimes, and coordination and information sharing in enforcement. Some agencies have long coordinated effectively, both with respect to domestic and international issues, even when not mandated to do so. Notably, there is evidence that better international cooperation can help agencies more proficiently accomplish their regulatory missions with fewer resources by dividing work, where appropriate, with foreign counterparts and mutually recognizing each others' inspection regimes and laboratory or test results. The FDA believes there is great potential for cost savings and improved health and safety in mutual reliance on the data from clinical trials and manufacturing quality inspection regimes in other countries. For example, the FDA recently concluded a pilot project with European and Australian regulators to inspect manufacturing plants in China and other countries that manufacture active pharmaceutical ingredients. The agencies compared their lists of plants subject to inspection and the resources that each country had available, and where two or more agencies were scheduled to visit the same plant, the agencies agreed on one agency to inspect that plant or to do a joint inspection, and reallocated resources so that they could cover more plants. Building on the success of that pilot, the FDA is now pursuing



a similar project with European regulators for site inspections of clinical trials. These cooperative approaches, which show potential for cost savings without diminishing regulatory effectiveness, might be expanded to other agency settings for further cost-saving effects.

However, global regulatory cooperation can be difficult to accomplish. Some agencies claim that they lack statutory authority to account for international effects when making regulatory decisions. Several agency officials, as well as high-level leaders, indicated that international regulatory cooperation was a low priority for certain agency leaders, as it is an issue with little visibility when accomplished successfully. Some agencies indicated that legal restrictions on information sharing can hinder international cooperation. Finally, coordination among some agencies within the United States government is a challenge, and agencies focused on trade and competitiveness, such as the Office of the United States Trade Representative (USTR), are not always aware of the activities of federal regulators.

Twenty years after the adoption of ACUS Recommendation 91-1, agencies increasingly recognize that international regulatory cooperation is an important component of their regulatory missions in today's globally integrated economy. While progress has been made, the scope of the problem leaves more work to be done to eliminate systemic barriers to coordination. The following recommendation restates the parts of the 1991 recommendation that remain valid and relevant and also addresses new considerations, to include promotion of best practices in transparency, mutual reliance, information sharing, and coordination within the United States. Accordingly, the recommendation supersedes Recommendation 91-1.

#### **RECOMMENDATION**

1. Agencies should inform themselves of the existence of foreign authorities<sup>1</sup> whose activities may relate to their missions. Agencies should consider strategies for regulatory cooperation with relevant foreign authorities when appropriate to further the agencies' missions or to promote trade and competitiveness when doing so does not detract from their missions.

2. Agencies should review their legal authorization to cooperate with foreign authorities under their authorizing statutes, bearing in mind obligations under the World Trade Organization Agreement on Technical Barriers to Trade and other relevant treaties adopted by the United States as well as Office of Management and Budget (OMB) guidance.

Where legal authorities do not sufficiently permit appropriate international cooperation in regulation and enforcement that would benefit agencies' missions or promote trade and competitiveness without detracting from their missions, agencies should recommend corrective legislation to OMB and Congress. Absent conflict with their legal authority or missions, agencies should give appropriate consideration to the international implications of regulatory activities.

3. When agencies conclude that they have legal authority and the interest in cooperation from foreign authorities, and that cooperation would further agencies' missions or promote trade and competitiveness without detracting from their missions, they should consider various modes of cooperation with those authorities, including but not limited to:

(a) establishment of common regulatory agendas;

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<sup>1</sup> Throughout this recommendation, the term "foreign authorities" includes a range of foreign and international counterparts, including but not limited to foreign government agencies, regional and international bodies, and, where appropriate, standard-setting organizations.

(b) exchange of information about present and proposed foreign regulation;

(c) concerted efforts to reduce differences between the agency's rules and those adopted by foreign government regulators where those differences are not justified;

(d) holding periodic bilateral or multilateral meetings (either in person or by teleconference or video conference) to assess the effectiveness of past cooperative efforts and to chart future ones; and

(e) mutual recognition of tests, inspections, clinical trials, and certifications of foreign agencies.

4. To deploy limited resources more effectively, agencies should, where appropriate and practicable, identify foreign authorities that maintain high quality and effective standards and practices and identify areas in which the tests, inspections, or certifications by agencies and such foreign agencies overlap. Where appropriate and practicable, agencies should:

(a) consider dividing responsibility for necessary tests, inspections, and certifications and mutually recognizing their results;

(b) create joint technical or working groups to conduct joint research and development and to identify common solutions to regulatory problems (for example, through parallel notices of proposed rulemaking);

(c) establish joint administrative teams to draft common procedures and enforcement and dispute resolution policies; and/or

(d) document and publish cost savings and regulatory benefits from such mutual arrangements.

5. To assess whether foreign authorities maintain high quality and effective standards and practices, agencies should develop and maintain relationships with foreign counterparts by providing training and technical assistance to foreign authorities and developing employee

exchange programs, as resources permit. Agencies should also, as resources permit, review whether foreign or international practices would be appropriate for adoption in the United States.

6. Agencies should engage in exchanges of information with foreign authorities to promote better, evidence-based decision-making. Types of information exchanges can range from formal agreements to share data to informal dialogues among agency staff. To the extent practicable, information exchange should be mutually beneficial and reciprocal. Prior to exchanging information, agencies must reach arrangements with foreign counterparts that will protect confidential information, trade secrets, or other sensitive information.

7. When engaging in regulatory dialogues with foreign authorities, agencies should seek input and participation from interested parties as appropriate, through either formal means such as Federal Register notices and requests for comments or informal means such as outreach to regulated industries, consumers, and other stakeholders. Agencies should, where consistent with their statutory authority, missions, and the public interest, consider petitions by private and public interest groups for proposed rulemakings that contemplate the reduction of differences between agency rules and the rules adopted by foreign authorities, where those differences are not justified. While international consultations of the sort described in this recommendation do not usually depart from an agency's standard practices in compliance with applicable procedural statutes, an agency engaged in such consultations should describe those consultations in its notices of proposed rulemaking, rulemaking records, and statements of basis and purpose under the Administrative Procedure Act. Where the objective of aligning American and foreign agency rules has had a

significant influence on the shape of the rule, that fact also should be clearly acknowledged.

8. Agencies should promote to foreign authorities the principles that undergird the United States administrative and regulatory process, including, as appropriate:

- (a) transparency, openness and public participation,
- (b) evidence-based and risk-informed regulation,
- (c) cost-benefit analysis,
- (d) consensus-based standard setting,
- (e) accountability under the law,
- (f) clearly defined roles and lines of authority,
- (g) fair and responsive dispute resolution procedures, and
- (h) impartiality.

An agency engaging in international regulatory cooperation should also be alert to the possibility that foreign regulatory bodies may have different regulatory objectives, particularly where a government-owned or controlled enterprise is involved.

9. When engaging with foreign authorities, agencies should, as appropriate, share information and consult with other government agencies having interests that may be affected by the engagement, including but not limited to OMB's Office of Information and Regulatory Affairs (OIRA); the Office of the United States Trade Representative (USTR); and the Departments of Commerce, State, and Defense.<sup>2</sup>

10. The Executive Office of the President should consider creating a high-level interagency working group of agency heads and other senior

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<sup>2</sup> Agencies should fully comply with 22 C.F.R. § 181.4, requiring, among other things, agencies to consult with OIRA before entering into international agreements that require significant regulatory action, and 19 U.S.C. § 2541, giving USTR responsibility for establishing mutual arrangements for standards-related activities.

officials to provide government-wide leadership on, and to evaluate and promote, international regulatory cooperation.

**Administrative Conference Recommendation 2011-7**

**The Federal Advisory Committee Act - Issues and Proposed Reforms**

**Adopted December 9, 2011**

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, governs the process whereby the President or an administrative agency obtains advice from groups that include one or more non-federal employees. It places various limits on the formation of such groups and requires that group meetings be open to public attendance and permit at least a limited degree of public participation. Though Congress has occasionally amended FACA,<sup>1</sup> the original framework of the 1972 Act has essentially remained intact to the present day. Nevertheless, FACA has faced criticism, with some contending that the Act imposes excessive procedural burdens and others arguing that it does not require agencies to do enough to promote openness and transparency. This recommendation offers proposals to Congress, the General Services Administration (GSA), and agencies that use advisory committees, to alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.

*Overview of FACA*

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<sup>1</sup> See, e.g., Federal Advisory Committee Act Amendments of 1997, Pub. L. No. 105-153, 111 Stat. 2689 (1997) (exempting meetings of the National Academy of Sciences and National Academy of Public Administration from FACA); Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (exempting certain interactions between federal agencies and state, local, and tribal officials from the requirements of FACA).

Congress, the President, and administrative agencies each can create advisory committees. Advisory committees are classified as either "discretionary" or "non-discretionary." "Discretionary" advisory committees include those that an agency forms of its own initiative or in response to a statute authorizing the creation of a committee.<sup>2</sup> "Non-discretionary" advisory committees include those formed by the President and those that Congress, by statute, specifically directs the President or an agency to establish.<sup>3</sup>

FACA furthers three major goals. First, the Act promotes transparency and public participation in the advisory committee process, providing for open meetings and permitting interested members of the public to submit written and/or oral comments to advisory committees.<sup>4</sup> Second, the Act seeks to ensure objective advice and limit the influence of special interests on advisory committees by requiring that the membership of an advisory committee "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."<sup>5</sup> Third, the Act seeks to preserve federal resources by requiring justifications for any new committees

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<sup>2</sup> 41 C.F.R. § 102-3.50. There are currently 271 committees established by agencies and 198 committees authorized by statute for a total of 469 discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).

<sup>3</sup> 41 C.F.R. § 102-3.50. There are currently 556 committees required by statute and 48 committees created by the President for a total of 604 non-discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).

<sup>4</sup> 5 U.S.C. App. 2 § 10; HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. Rep. No. 91-1731, at 17-21 (1970) (hereinafter "1970 HOUSE REPORT").

<sup>5</sup> 5 U.S.C. App. 2 §§ 9(b)(2), (c); 1970 HOUSE REPORT at 19.

and periodic review of existing committees to ensure that they continue to serve a useful purpose.<sup>6</sup>

In order to trigger FACA, an assemblage of individuals must include at least one non-federal employee as well as meet the following requirements: (a) work as a group, (b) be "established" by statute or "established or utilized" by the President or an administrative agency, and (c) provide "advice or recommendations" to the President or a federal agency.<sup>7</sup> The courts have held that certain types of interactions do not meet this threshold for triggering FACA. Specifically, courts have held that (a) assemblages of persons providing advice to the government individually are not "groups" subject to FACA,<sup>8</sup> (b) groups formed by private contractors that are not subject to direct management or control by an administrative agency are not "utilized" by the agency so as to trigger FACA,<sup>9</sup> (c) subcommittees that report to a parent committee are not subject to FACA's open meeting requirements since the subcommittee does not itself provide "advice or recommendations" to the agency,<sup>10</sup> and (d) groups in which the non-government members lack a formal vote or veto over the "advice or recommendations" the committee ultimately provides do not implicate FACA.<sup>11</sup>

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<sup>6</sup> 5 U.S.C. App. 2 §§ 7(b), 9(c), 14(a); 1970 HOUSE REPORT at 4, 12, 15-16.

<sup>7</sup> 5 U.S.C. App. 2 § 3(2). Nonetheless, FACA specifically exempts certain meetings that otherwise satisfy these requirements. See *supra* note 1.

<sup>8</sup> *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

<sup>9</sup> *Byrd v. United States Env'tl. Prot. Agency*, 174 F.3d 239, 246-47 (D.C. Cir. 1999); *Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990).

<sup>10</sup> *Nat'l Anti-Hunger Coal. v. Exec. Comm. of the President's Private Sector Survey of Cost Control*, 711 F.2d 1071, 1075-76 (D.C. Cir. 1983); 41 C.F.R. § 102-3.35.

<sup>11</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).



All advisory committees subject to FACA must comply with a number of procedural requirements.<sup>12</sup> Prior to the committee's commencing its work, an agency creating a discretionary committee must consult with the General Services Administration (GSA) regarding the need for the proposed committee, and all committees must have a charter setting forth the committee's mission.<sup>13</sup> The members selected to serve on the proposed committee must reflect an appropriate balance of the points of view and fields of expertise relevant to the committee's work.<sup>14</sup> FACA only requires that committees achieve balance on factors specifically relevant to the committee's work, but a number of agencies have adopted policies of achieving balance on additional factors. Committee members selected to provide individual expert advice are appointed as "Special Government Employees" (SGEs) and must comply with ethics requirements similar to those applicable to regular government employees, whereas members chosen to represent a particular interest group with a stake in the committee's work are appointed as "representatives" and are not subject to ethics requirements.<sup>15</sup> Once a committee is formed, the agency must announce any committee meetings in advance in the Federal Register, permit interested members of the public to attend such meetings,<sup>16</sup> and receive comments from individuals interested in the

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<sup>12</sup> 5 U.S.C. App. 2 § 3(2).

<sup>13</sup> *Id.* §§ 7(c), 9(c); 41 C.F.R. §§ 102-3.60-75.

<sup>14</sup> 5 U.S.C. App. 2 §§ 5(b)(2), (c); 41 C.F.R. §§ 102-3.30(c), 102-3.60(b)(3).

<sup>15</sup> 5 U.S.C. App. 2 §§ 5(b)(3), (c); 18 U.S.C. § 202(a); 41 C.F.R. § 102-3.105(h); U.S. Office of Government Ethics, Memorandum from J. Jackson Walter, Director of the Office of Government Ethics, to Heads of Departments & Agencies of the Executive Branch regarding Members of Federal Advisory Committees & the Conflict-of-Interest Statutes 3-5 (July 9, 1982).

<sup>16</sup> Under certain circumstances, a committee may close an entire meeting or parts thereof. 5 U.S.C. App. 2 § 10(d); 41 C.F.R. § 102-3.155. In recent years, the majority of committee meetings have been either partially or fully closed from public attendance. See FACA Database:

committee's work.<sup>17</sup> The public, upon request, must be given access to all documents presented to or prepared for or by the advisory committee.<sup>18</sup> Finally, agencies must re-charter each existing committee every two years and, as part of that process, show that the committee has continued relevance and that the costs of its continued existence do not outweigh the benefits it provides.<sup>19</sup>

Agencies are also subject to Executive Order 12,838, issued by President Clinton in 1993, which required agencies to reduce the number of their discretionary advisory committees by one-third.<sup>20</sup> The Office of Management & Budget then issued Circular A-135, which capped the number of agency discretionary committees at the reduced levels permitted by the Executive Order.<sup>21</sup> Administrative agencies collectively can maintain a total of 534 discretionary advisory committees without exceeding the cap.

In certain instances, agencies may wish to form advisory committees consisting of representatives from different stakeholder communities to negotiate the text of a proposed rule.<sup>22</sup> Congress has specifically

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FY2010 Government Totals,

<http://fido.gov/facadatabase/rptgovttotals.asp> (last visited September 21, 2011) (noting that, thus far in 2011, 71% of committee meetings have been completely closed, 4% partially closed, and 25% fully open).

<sup>17</sup> 5 U.S.C. App. 2 § 10; 41 C.F.R. §§ 102-3.140, 102-3-150.

<sup>18</sup> 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.

<sup>19</sup> 5 U.S.C. App. 2 § 14; 41 C.F.R. § 102-3.60. In addition to the re-chartering process, the Administrator of GSA conducts an annual review of existing committees designed to ensure that such committees continue to serve useful purposes and to recommend eliminating any committees that do not, 5 U.S.C. App. 2 § 7(b); 41 C.F.R. § 102-3.100(b)(1), and the head of each agency is responsible for eliminating any advisory committee that no longer justifies the expenditure of resources required to perpetuate it, 41 C.F.R. §§ 102-3.30(b), 102-3.105(e).

<sup>20</sup> Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

<sup>21</sup> Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53856, 53857 (Oct. 26, 1994).

<sup>22</sup> DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (Administrative Conference of the U.S. 1995).

authorized this process, known as "negotiated rulemaking," in the Negotiated Rulemaking Act of 1990.<sup>23</sup> In most instances, negotiated rulemaking committees are subject to FACA,<sup>24</sup> except as modified by the Negotiated Rulemaking Act or another statute. The Negotiated Rulemaking Act provides some of the same protections as FACA, requiring that the agency make certain findings regarding the need for a negotiated rulemaking committee<sup>25</sup> and that negotiated rulemaking committees be balanced to include representatives from all relevant stakeholder communities.<sup>26</sup> However, requirements pertaining to notices and openness of meetings stem from FACA rather than from the Negotiated Rulemaking Act.

#### *Research Methodology*

Both governmental agencies and private groups have criticized the existing FACA regime. Many agencies contend that it is overly cumbersome and limits their ability to obtain outside advice. Numerous private groups have argued that the statute does not adequately promote transparency or preserve a role for the public to participate in the work of committees. Congress has also recently proposed various reforms to FACA that would, as a general matter, extend the scope of the Act and require agencies to undertake various steps to increase transparency in their use of advisory committees.<sup>27</sup> In light of the recent interest expressed in reforming FACA, study of the Act is timely. In order to identify the problems driving these concerns and formulate potential solutions, the Conference undertook an extensive study, seeking input from individuals and groups within and outside of

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<sup>23</sup> Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. § 561 *et seq.*).

<sup>24</sup> 5 U.S.C. § 565(a)(1).

<sup>25</sup> *Id.* § 563.

<sup>26</sup> *Id.* §§ 563(a)(2)-(3), 564(a)(3)-(4), 565(a)(1).

<sup>27</sup> H.R. 3124, 112th Cong. § 3(b) (2011).

the federal government. The data-gathering effort included: (a) two separate surveys, with one focusing on agency Committee Management Officers (CMOs), who are responsible for compliance with FACA, and the other focusing on "clients" of advisory committees such as agency program officers and general counsel's offices; (b) a workshop with approximately 50 participants, including numerous agency representatives with extensive experience in the use of advisory committees and members of non-governmental organizations that promote government transparency; and (c) dozens of interviews of FACA experts (not limited to CMOs) both within and outside of the federal government.

#### *Research Results*

The data gathered suggest that FACA and/or its implementation by administrative agencies has given rise to at least three types of problems: (1) procedural burdens that inhibit the effective use of advisory committees without substantially furthering the policies of the Act; (2) confusion about the scope of the statute that may discourage agencies from using committees or induce them to engage in "work-arounds" to avoid triggering its requirements; and (3) agency practices that either undermine or fail to fully promote the transparency and objectivity of the advisory committee process.

The recommendations below propose reforms to address these problems. The first group of recommendations seeks to alleviate barriers and perceived barriers<sup>28</sup> to the government's use of advisory committees by

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<sup>28</sup> The Conference's empirical research indicated that the principal sources of delay in the committee formation process are within agencies themselves rather than resulting from delays associated with GSA's review of proposed committee charters. Nevertheless, informed observers were concerned that there exists a widespread perception among agencies that GSA's review of proposed charters constitutes a de facto approval process rather than a consultation requirement, thereby

proposing a simplified process by which agencies create advisory committees and select their members and by recommending the removal of the arbitrary cap on the number of advisory committees.<sup>29</sup>

The second set of recommendations seeks to clarify the Act's scope in light of cases interpreting the Act and in anticipation of congressional amendments recently under consideration that might inhibit agencies' use of advisory committees or lead to use of alternative procedures to avoid triggering the Act. One such amendment would require subcommittees to comply with all provisions of FACA other than chartering, including the open meeting requirements.<sup>30</sup> The Conference recommends that if Congress eliminates the subcommittee exemption, then it should codify what is currently a regulatory exemption allowing agencies to conduct preparatory work in closed meetings, without a requirement of advance public notice.<sup>31</sup> The

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causing some agencies to invest excessive time in drafting committee charters prior to submission to GSA for review.

<sup>29</sup> Though the 469 discretionary advisory committees in existence are currently well short of the 534 discretionary committees authorized, the cap can nevertheless create procedural burdens for agencies and inhibit their ability to obtain needed outside advice. Since GSA allots each agency a specific number of potential discretionary advisory committees, an agency that intends to exceed its individual ceiling must request that GSA adjust that ceiling. Agency officials interviewed as part of the research also indicated that individuals outside of the CMO's office were sometimes unsure of whether the agency was likely to exceed its discretionary committee ceiling and were therefore reluctant to request additional committees.

<sup>30</sup> H.R. 3124, 112th Cong. § 3(b) (2011).

<sup>31</sup> Concerns have also been expressed that exemption from FACA of meetings of committees formed by private contractors at agencies' behest, and committees wherein all voting members are federal employees, creates the potential for circumvention of the Act. See Reeve T. Bull, *The Federal Advisory Committee Act: Issues & Proposed Reforms* 17-18, 20-21, 40-42 (September 12, 2011). The Conference believes that additional research concerning the extent to which agencies utilize such exemptions and the extent to which their use thereof defeats the policies the Act was intended to serve would be beneficial in determining whether such exemptions should be either

Conference also recommends that GSA clarify the Act's applicability to "virtual meetings" conducted via web forum to ensure that agencies are not chilled from using this technique and that Congress clarify the applicability of FACA principles to negotiated rulemaking committees.

The third set of recommendations proposes that both Congress and agencies adopt certain procedures that would enhance the transparency and objectivity of the advisory committee process without imposing onerous procedural or financial burdens on the agencies. These include "best practices" related to committee formation and operation (such as posting committee documents online, webcasting committee meetings, and soliciting input on potential committee members) and recommendations related to the classification of committee members for purposes of applying ethics standards.

#### **RECOMMENDATION**

##### **Alleviating Procedural Burdens That Inhibit the Effective Use of Advisory Committees**

1. Congress should amend the Federal Advisory Committee Act ("FACA") and the General Services Administration ("GSA") should amend its FACA implementing regulations to eliminate any requirement that agencies consult with the Administrator of GSA prior to forming or renewing an advisory committee or implementing a major change to the charter of an existing committee. Specifically, Congress should delete the phrase "after consultation with the Administrator" from section 9(a)(2) of FACA, and GSA should eliminate or suitably revise 41 C.F.R. §§ 102-3.60, 102-3.85(a), which currently require such consultation with GSA's

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eliminated entirely or scaled back so as to apply only in a specific set of circumstances.

Committee Management Secretariat.<sup>32</sup> Agencies should still be required to prepare and file committee charters and should be permitted (but not required) to consult with GSA to obtain advice regarding preparation of the charter or other aspects of committee formation. Agencies should also still be required to file charters as under current law,<sup>33</sup> including filing with GSA for informational purposes and for inclusion in the FACA database. GSA should continue to post all committee charters online.

2. Agencies should identify and prioritize those factors for achieving balance among committee members that are directly relevant to the subject matter and purpose of the committee's work. The committee charter should include a description of the committee's mission and the most relevant balance factors.

3. Whenever Congress creates an advisory committee through legislation, it should indicate its intent as to the mission, estimated duration, budget, and preferred membership balance for the committee. Whenever such committees are exempted from the biennial review process, Congress should provide guidance concerning the intended duration of each such committee or, alternatively, a clear explanation of the committee's mission and a provision that the committee should terminate upon completion of that mission.

4. The President and the Office of Management and Budget should eliminate the cap on the number of discretionary advisory committees established by Executive Order 12,838 and Circular A-135.

#### **Clarifying the Scope of FACA**

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<sup>32</sup> GSA would continue to offer advice on committee formation and operation to agencies that seek such advice, and its regulations might authorize agencies to obtain advice on committee formation and operation from the Committee Management Secretariat.

<sup>33</sup> 5 U.S.C. App. 2 § 9(c); 41 C.F.R. § 102-3.70.

5. Congress should not eliminate the exemption for subcommittees that report to parent committees currently stated in 41 C.F.R. § 102-3.35 unless it codifies an exemption providing that members of committees or subcommittees may meet to conduct "preparatory work" without complying with the notice and open meeting requirements of the Act. The statutory definition of "preparatory work" should be similar to that currently provided in FACA's implementing regulations at 41 C.F.R. § 102-3.160(a). Congress and/or GSA should also consider including a clearer list of activities that constitute "preparatory work" than that currently contained in the implementing regulations, including activities such as (i) drafting documents for consideration at a committee meeting, (ii) conducting research or preliminary analysis on topics for discussion at a committee meeting, (iii) engaging in pre-decisional deliberations, (iv) choosing meeting topics, and (v) considering future projects for the committee to undertake.

6. GSA should amend section 102-3.140(e) of the FACA implementing regulations to clarify that, in addition to holding teleconferenced or webconferenced meetings, agencies also may host virtual meetings that can occur electronically in writing over the course of days, weeks or months on a moderated, publicly accessible web forum. Agencies with advisory committees should be aware that they have the option of holding committee meetings via such online forums. To the extent they conduct meetings by web forum, agencies should monitor the process and determine whether it is an efficient and transparent means of hosting meetings.

7. Congress should amend the Negotiated Rulemaking Act (5 U.S.C. § 561 *et seq.*) to provide that committees engaged in negotiated rulemaking are exempt from FACA but that such committees should be required to announce full committee meetings in advance and open them to public



attendance. The amendments should codify existing procedures that allow caucuses or other sub-groups of committee members to meet privately, provided that such caucuses or sub-groups make no final decisions on behalf of the full committee. In the event that Congress does eliminate the FACA exemption applicable to subcommittees of advisory committees, 41 C.F.R. § 102-3.35, but does not exempt negotiated rulemaking committees from FACA, it should create a carve-out allowing negotiated rulemaking caucuses or other sub-groups to continue to hold meetings privately so long as they do not make final decisions on behalf of the full committee.

#### **Enhancing Transparency and Objectivity**

8. Congress and agencies should adopt the following procedures with respect to the ethics requirements applicable to advisory committee members:

(a) In creating statutory advisory committees, Congress should specify the intended classification of committee members for purposes of applying federal ethics laws. Congress should explicitly classify as "representatives," not subject to ethics standards, those members who are selected to represent the perspective or interests of a particular group with a stake in the work of the advisory committee. It should explicitly classify as "special government employees" (SGEs), subject to specified federal ethics laws and rules, members who are chosen to provide individual, independent, expert advice.

(b) Congress and individual agencies should prevent misuse of the "representative" designation by limiting it to individuals selected to represent some entity or group with a stake in the committee's work and should not apply that designation to persons who, by virtue of their expertise, might be said to "represent" a field of study or discipline

but do not represent the views of a particular interest group. Such members are more appropriately classified as SGEs.<sup>34</sup>

(c) Agencies that grant conflict of interest waivers under 18 U.S.C. § 208(b) should post such waivers on their websites without awaiting a public request for releasing them.<sup>35</sup> Agencies should make appropriate provisions for redacting from such waivers information that they may keep confidential pursuant to 18 U.S.C. § 208(d)(1).

9. Agencies should post on a committee website documents "which were made available to or prepared for or by each advisory committee" (i.e., documents that must be made publicly available on request under section 10(b) of FACA) and that reflect the substantive work of the committee. Agencies should attempt to post documents relevant to upcoming meetings (e.g., draft reports, recommendations, or meeting agendas) as early as possible in advance of the meeting to which they relate and other

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<sup>34</sup> In 2004, the Government Accountability Office issued a report suggesting that a number of agencies had improperly classified individuals possessing expertise in a particular field of study as representatives on the theory that they "represented" that discipline. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-328, ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE & BALANCE 5 (2004). Since that time, the Office of Government Ethics has issued a number of memoranda to Designated Agency Ethics Officials clarifying the distinction between SGEs and representatives and advising agencies to appoint persons selected to provide independent, expert advice as SGEs. See generally U.S. Office of Government Ethics, Memorandum from Marilyn L. Glynn, General Counsel, to Designated Agency Ethics Officials Regarding Federal Advisory Committee Appointments (Aug. 18, 2005); U.S. Office of Government Ethics, Memorandum to Designated Agency Ethics Officials (July 19, 2004). The Office of Government Ethics also enhanced its examination of agencies' classification of committee members when conducting an ethics program review. United States Office of Government Ethics, Ethics Program Review Guidelines 40-45 (Oct. 2004).

<sup>35</sup> The Office of Government Ethics has issued guidance describing the type of information that a waiver should contain. U.S. Office of Government Ethics, Memorandum from Robert I. Cusick, Director, to Designated Agency Ethics Officials Regarding Waivers under 18 U.S.C. § 208 (Feb. 23, 2007).

materials that document the events of past meetings (e.g., minutes or transcripts) as quickly after the meeting as possible.

10. Agencies should provide live webcasts of open committee meetings and/or post recordings following such meetings unless the costs are prohibitive. When selecting a webcasting technology, agencies should assess the likely level of public interest in their committees' work, the cost of different technologies (as well as the cost savings such technologies can create), and their available resources.<sup>36</sup>

11. Upon creating a new advisory committee, agencies should announce the committee's mission in the Federal Register and/or on the agencies' website and invite nominations for potential committee members, from the public, from expert communities with experience in the subject matter of the committee's assignment, and/or from groups especially likely to be affected by the committee's work.

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<sup>36</sup> GSA has negotiated government-specific terms of service for a number of technology products and maintains these terms for agency use on the web at "apps.gov"; the site includes several free webcasting programs that agencies should consider using for providing webcasts of committee meetings.

**Administrative Conference Recommendation 2011-8**

**Agency Innovations in E-Rulemaking**

**Adopted December 9, 2011**

The rulemaking function of federal regulatory agencies is typically accomplished today through "e-rulemaking": that is, through "the use of digital technologies in the development and implementation of regulations," before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA)."<sup>1</sup> The website [www.regulations.gov](http://www.regulations.gov) centralizes much e-rulemaking activity throughout the executive branch. This recommendation concerns individual agencies' uses of their own websites to promote e-rulemaking and other agency initiatives and activities.

The proliferation of competing demands for communication makes rulemaking only one of the many priorities under consideration when agency officials make decisions about the design and functionality of their websites. As a result, there is a risk agencies will make website design decisions without giving due consideration to enhancing public participation in rulemaking through the use of electronic media. Indeed, an emerging approach to government website design focuses on giving prominence to "top tasks" sought by members of the public. However, an exclusive focus on current website use or demand may push information about rulemaking, and online opportunities for public commenting on rulemaking, far into the background—simply because the volume of website traffic generated by online government services

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<sup>1</sup> Administrative Conference of the United States, Recommendation 2011-1, Legal Considerations in e-Rulemaking 1 (quoting Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process* 2 (2004) (working paper), [http://lsr.nellco.org/upenn\\_wps/108](http://lsr.nellco.org/upenn_wps/108)).

performed by many agencies dwarfs the traffic related to rulemaking. Rulemaking may never be a "top task" in terms of the numbers of Web users, but in a democracy, few tasks compare in significance with the ability of government agencies to create binding law backed up with the threat of civil, and even criminal, penalties.

The Conference studied the websites and e-rulemaking initiatives of 90 agencies, each of which had reported completing an average of two or more rulemakings during each six-month period covered by the semiannual Unified Regulatory Agenda in 2009-2010. The study reveals that individual agencies have used websites in innovative ways to promote e-rulemaking. For example, agencies have developed portions of their own websites to support rulemaking efforts. Some agencies have specialized webpages that allow users to submit and view comments on all of the agency's open rulemakings, or to view information on the status of their priority rulemakings. Links from some agency home pages make rulemaking information easy to locate. Other agencies have innovated by using social media to get the public involved in the rulemaking process from the earliest stages. These social media tools include blogs, Facebook, Twitter, IdeaScale, and other online discussion platforms.

Agency innovations can improve the availability of information and engage the public in rulemaking activities, often at no great cost to the government. A cost-effective technique to improve the availability of rulemaking information on individual agency websites leverages available centralized data sources. An example of this approach is found on the websites of many members of Congress, who provide a link on their home page to a page listing all the legislation the member sponsors. The list is not drawn from the Member's own database, but rather extracts information from a THOMAS database of all legislation

currently pending in Congress. Regulations.gov makes a similar tool available to agencies, thus enabling them to provide easy access to complete and up-to-date rulemaking information without the necessity of maintaining the underlying database.

Agency innovations can also further well-established policies in favor of broadening access by groups that have historically faced barriers to participating effectively in rulemaking. In 2000, President Clinton issued Executive Order 13166 in an effort "to improve access to ... programs and activities for persons who, as a result of national origin, are limited in their English proficiency."<sup>2</sup> The Office of Management and Budget's policy on agency websites reminds agencies that they are "required to provide appropriate access for people with limited English proficiency."<sup>3</sup> Similarly, until high-speed Internet access is pervasive across all strata of society, any agency that makes full public access and participation a priority should explore low bandwidth options, while also remembering that some members of the public do not have Internet access at all. In addition, continued vigilance is needed to ensure that agency websites and other electronic media will be as accessible to individuals with disabilities as they are to other users. This accessibility may grow even more challenging in the wake of new techniques for organizing a large volume of information on a website.

Individual agency websites can also be used to address discrete deficiencies in the availability of critical rulemaking information.

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<sup>2</sup> Exec. Order No. 13166, 65 Fed. Reg. 50121, 50121 (Aug. 11, 2000).

<sup>3</sup> OMB Deputy Director for Management Clay Johnson, Memorandum on Policies for Federal Agency Public Websites (Dec. 17, 2004), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/-fy2005/m05-04.pdf>.

One such problem is that many agencies' policies relating to comments<sup>4</sup> cannot be found easily by the public. Even on Web pages dedicated to the submission of comments, a comment policy is not always visible to the user. A second difficulty arises with old rulemaking materials, which need to be preserved for archival, historical, and legal reasons, but are often difficult for users to find and search. A third issue is that agency websites are uniformly easy to locate, but do not always include features to ensure that essential information, particularly about rulemaking, is broadly accessible to the public.

The Conference believes that, as a general matter, agencies should continue to improve their websites to facilitate public accessibility and engagement so as to achieve the promise of e-rulemaking. This recommendation is intended to broadly encourage agencies to develop and use innovative, cost-effective ways to use individual websites to solve some of the discrete problems identified above and generally engage the public in rulemaking.

#### **RECOMMENDATION**

##### **Increasing the Visibility of Rulemakings**

1. Agencies should design and manage their presence on the Web (including the Web as accessed by mobile devices) with rulemaking participation in mind.<sup>5</sup>
2. Each agency should provide access to a one-stop location, which should be easily reachable from its home page, for all of its pending

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<sup>4</sup> See generally Administrative Conference of the United States, Recommendation 2011-2, Rulemaking Comments (recommending that agencies establish and publish certain policies governing rulemaking comments).

<sup>5</sup> Throughout this recommendation, the term "rulemaking" includes, but is not limited to, the following proceedings, providing an agency is seeking or intends to seek public comment on them: planned rulemakings that have appeared in the Unified Agenda, rules at the advanced notice of proposed rulemaking stage, and proposed nonlegislative rules. The recommendation also extends to guidance documents on which an agency is seeking or intends to seek public comment.

rulemakings, highlighting those that are currently open for comment. This may take the form of providing pinpoint links to specific information about the agency's rulemakings available on websites such as Regulations.gov, RegInfo.gov, Federal Register 2.0, and so forth, which would allow the agency to efficiently enable the public to retrieve all available information the federal government has about its ongoing rulemakings.

3. Agencies should consider, in appropriate rulemakings, using social media tools to raise the visibility of rulemakings. When an agency sponsors a social media discussion of a rulemaking, it should provide clear notice as to whether and how it will use the discussion in the rulemaking proceeding.

#### **Making Comment Policies Easy to Locate**

4. Agencies should display or link to their comment policies in prominent or multiple locations on their websites.

#### **Improving Access to Agency Websites**

5. Agencies should continue to improve the accessibility of their websites to members of the public.

6. Agencies should take steps to improve access for persons who have faced barriers to effectively participating in rulemaking in the past, including non-English speakers, users of low-bandwidth Internet connections, and individuals with disabilities.

#### **Ensuring Access to Materials from Completed Rulemakings**

7. Agencies should develop systematic protocols to enable the online storage and retrieval of materials from completed rulemakings. Such protocols should, to the extent feasible, ensure that website visitors using out-of-date URLs are automatically redirected to the current location of the material sought.



**Periodically Evaluating Agency Use of the Internet in Rulemaking**

8. Agencies should periodically evaluate their use of the Internet in rulemaking and should continue to innovate and experiment with new and cost-effective ways to engage the public in rulemaking via the Internet.

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11. [FR Doc. 2012-621 Filed 01/13/2012 at 8:45 am; Publication Date: 01/17/2012]